In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MEYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY

Petitioners

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and Named PLAINTIFFS IN FORTY-EIGHT OTHER CASES

Respondents

PLAINTIFFS-RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN A. COCHRANE
Suite 830 Minnesota Building
Saint Paul, Minnesota 55101
Chairman, Plaintiffs National Steering Committee

THOMAS J. GREENAN
929 Logan Building
Seattle, Washington 98101
Member, Plaintiffs National Steering Committee and Committee of Government Plaintiffs Counsel

RICHARD W. JOHNSON
ROGER A. JOHNSON
1705 First National Bank Building
Minneapolis, Minnesota 55402
Members, Plaintiffs National Steering Committee and Committees of Miscellaneous and Farm Plaintiffs Counsel

FLOYD E. BOLINE
854 Midland Bank Building
Minneapolis, Minnesota 55401
Member, Plaintiffs National Steering Committee and Committee of Farm Plaintiffs Counsel

TABLE OF CONTENTS

	PAGE
Question Presented	2
Statement of the Case	2
1. History and status of this litigation	2
2. Proceedings Below	8
3. Findings of the Court of Appeals	8
Reasons for Denying the Writ	13
I. The Eighth Circuit properly applied the law, including the decision of this court, in reaching its decision	13
II. Petitioners argument has no foundation in law or fact	16
III. Neither the decision of the court below nor the legal proposition advocated by petitioners presents an issue which warrants review by this court	19
Conclusion	20

TABLE OF AUTHORITIES

Statutes and Rules of Procedure:

15 U.S.C. §16(a)	6
15 U.S.C. §16(b)	6
28 U.S.C. §144	8, 13
28 U.S.C. §1404(a)	5
28 U.S.C. §1407	3
Federal Rules of Civil Procedure	19
Supreme Court of the United States, Revised Rules 19	2

Cases:

In the Matter of American Cyanamid Company, et al, Docket No. 7211 (complaint filed July 28, 1958), order vacated and remanded, 363 F.2d 757 (6th Cir. 1966), order after remand aff'd, sub nom., Chas. Pfizer & Co., Inc. v. Federal Trade Commission, 401 F.2d 574 (6th Cir. 1968), cert. denied, 394 U.S. 920 (1969) 2, 9

Ex parte American Steel Barrell, 230 U.S. 35 (1913) 15

In re Antibiotic Antitrust Actions, 333 F. Supp. 317 (S.D.N.Y. 1971) 6

In re Antibiotic Drugs, 320 F. Supp. 586 (J.P.M.L. 1970) 4, 12

In re Antibiotic Drug, 295 F. Supp. 1402 (J.P.M.L. 1968) 3

Berger v. United States, 255 U.S. 22 (1921) 8, 14, 15, 16, 17, 18, 19, 20

Chafin v. United States, 5 F.2d 592 (4th Cir. 1925), cert. denied, 269 U.S. 552 2

Clark v. United States, 289 U.S. 1, 15 (1933) 6

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 17, 18

Craven v. United States, 22 F.2d 605 (1st Cir. 1927), cert. denied, 276 U.S. 627 ..... 19, 20

Foster v. Medina, 170 F.2d 632 (2nd Cir. 1948), cert. denied, 335 U.S. 909 20

Graham v. John Deere Co., 383 U.S. 1, 18-19 (1966) 12

Hanger v. United States, 398 F.2d 91 (8th Cir. 1968), cert. denied, 393 U.S. 119 22

Hartford Hospital v. Chas. Pfizer & Co., Inc., 1971 Trade Cas. ¶ 73,561 (S.D.N.Y. 1971) 4

Hazel-Atlas Glass v. Hartford Empire Co., 322 U.S. 238 (1944) 11

Hodgdon v. United States, 365 F.2d 679 (8th Cir. 1966), cert. denied, 385 U.S. 1029 22

Lyons v. United States, 325 F.2d 370 (9th Cir. 1963), cert. denied, 377 U.S. 969 (1964) 20

Offutt v. United States, 348 U.S. 11 (1954) 17

Chas. Pfizer & Co., Inc. v. Federal Trade Commission, 401 F.2d 574 (6th Cir. 1968) 11
Pfizer, Inc. v. Lord, No. 71-1581 (8th Cir., February 15, 1972) 5, 7, 8
Pfizer, Inc. v. Lord, 449 F.2d 119 (2nd Cir. 1971) ... 5
Pfizer, Inc. v. Lord, 447 F.2d 122 (2nd Cir. 1971) ... 5
Price v. Johnston, 125 F.2d 806 (9th Cir. 1942), cert. denied, 316 U.S. 677 20
Ryan v. United States, 99 F.2d 864 (8th Cir. 1938), cert. denied, 306 U.S. 635 20
Scott v. Beams, 122 F.2d 777 (19th Cir. 1941), cert. denied, 315 U.S. 809 20
In re Union Leader Corp., 292 F.2d 381 (1st Cir. 1961), cert. denied, 368 U.S. 927 20
United States v. Chas. Pfizer & Co., Inc., 61 Cr. 772 (Indictment returned August 17, 1961), rev'd for new trial, 426 F.2d 32 (2nd Cir. 1970), prior en banc hearing order vacated, opinion of panel modified, and petition for rehearing denied, 437 F.2d 957, aff'd by equally divided court, 40 U.S.L.W. 3348 (1972) 3
United States v. Grinnell Corp., 384 U.S. 563 (1966) 15, 16, 18, 20, 21, 22
West Virginia v. Chas. Pfizer & Co., Inc., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir. 1971), cert. denied, 404 U.S. 871 4

Secondary Authorities:

Federal Trade Commission, Economic Report on Antibiotics Manufacture (1958) 7
Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, on Administered Prices in the Drug Industry, 86th Cong., 1st and 2d Sess., Vols. 14-26 (1959-60) 7
Manual for Complex and Multidistrict Litigation 19
Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, a Study of Administered Prices in Drug Industry, S. Rep. No. 448, 87th Cong., 1st Sess. (1961) 7

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MEYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY

Petitioners

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and Named PLAINTIFFS IN FORTY-EIGHT OTHER CASES

Respondents

PLAINTIFFS-RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Plaintiffs-Respondents, by their Plaintiffs National Steering Committee,[1] submit this brief in opposition to the

[1]Pretrial Order No. 1, *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, M 19-93A, (February 24, 1970, S.D.N.Y.) designated Committees of Counsel representing certain functional classes of parties, to assist in coordination of pretrial activities. These committees included a Committee of Government Plaintiffs Counsel, a Committee of Farm Plaintiffs Counsel, a Committee of Miscellaneous Plaintiffs Counsel, a Committee of Defense Counsel, and a Committee of Private Hospital Plaintiffs Counsel (representing clients who have since settled their cases). Pretrial Order No. 1 further established the Plaintiffs National Steering Committee, composed of representatives of each committee of plaintiffs counsel. The Steering Committee was directed to do whatever is reasonably possible to coordinate the activities of all plaintiffs without duplication of activities.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in *Pfizer, Inc. v. Honorable Miles W. Lord*, No. 71-1580 (8th Cir., February 15, 1972).

QUESTION PRESENTED

Should this Court grant the Petition for a Writ of Certiorari when the Court of Appeals has concluded on the basis of the standards enunciated in the applicable decisions of this Court that petitioners' affidavit failed to disclose a legally sufficient basis for recusing the trial judge on grounds of "personal bias and prejudice."

STATEMENT OF THE CASE

The Court of Appeals, having first reviewed the lower court's comments and actions and evaluated them against circumstances and standards set forth in the decisions of this Court and other appellate courts, found that "the facts contained in petitioners' affidavit fall short of showing the bias and prejudice needed to recuse." (Pet. App., 28a). There are no special or important reasons which necessitate a review of this decision.[2]

1. History and Status of this Litigation

These actions all arose out of a Federal Trade Commission proceeding instituted against petitioners in 1958,[3] and

[2]See Supreme Court of the United States, *Revised Rules*, 19.

[3]*In the Matter of American Cyanamid Company, et al.*, Docket No. 7211 (complaint filed July 28, 1958), *order vacated and remanded*, 363 F.2d 757 (6th Cir. 1966), *order after remand aff'd, sub nom., Chas. Pfizer & Co., Inc. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

a criminal anti-trust action brought by indictment in the Southern District of New York in 1961.[4]

More than one hundred and fifty such actions were brought in districts throughout the country including the District of Minnesota. Each of the actions alleges in substance that commencing not later than 1953, the defendants combined and conspired to restrain interstate and foreign trade and commerce in the manufacture, sale and distribution of tetracycline and other broad spectrum antibiotic products and that they also conspired to and did monopolize the manufacture, sale and distribution of those products in interstate and foreign commerce. As one of the means of effectuating this illegal monopoly and conspiracy in restraint of trade, certain of the petitioners failed to present and fraudulently misrepresented known facts in the procurement of a product patent from the United States Patent Office.

In the fall of 1968, the Judicial Panel on Multidistrict Litigation commenced transferring these actions to the Southern District of New York for coordinated pretrial proceedings pursuant to *28 U.S.C.* §1407.[5] All actions were originally assigned to the Honorable Inzer B. Wyatt. On February 6, 1969, two separate settlement offers were made to various groups of plaintiffs. Throughout 1969 and

---

[4]*United States v. Chas. Pfizer & Co., Inc.*, 61 Cr. 772 (Indictment returned August 17, 1961), *rev'd for new trial*, 426 F.2d 32 (2nd Cir. 1970), *prior en banc hearing order vacated, opinion of panel modified, and petition for rehearing denied*, 437 F.2d 957, aff'd by equally *divided court*, 40 U.S.L.W. 3348 (1972).

[5]*In re Antibiotic Drug Litigation*, 295 F. Supp. 1402 (J.P.M.L. 1968). Subsequent transfers are reported at 309 F. Supp. 155 (J.P.M.L. 1970), 301 F. Supp. 1158 (J.P.M.L. 1969), and 299 F. Supp. 1403 (J.P.M.L. 1969).

subsequently, hearings were held on one of these offers which was ultimately approved by the Court.[6]

The second settlement offer mentioned was initially rejected by those to whom it was extended. Subsequently, a new offer was extended to a smaller group of Plaintiffs. This offer was accepted by a majority of those to whom the offer was extended, and was approved by the Court.[7]

These cases pose complex legal and administrative problems of enormous porportions. The burdens on the time and energy of the Court were multiplied many fold by the two settlements, each of which had to be administered and approved independent of one another and independent of the "non-settling" cases.

By early fall of 1970, it was apparent that the awesome burdens imposed upon Judge Wyatt were too much for one person. In the hopes of dividing up this burden and of expediting the litigation, plaintiffs moved the Judicial Panel on Multidistrict Litigation for an order transferring the cases from the Southern District of New York to the District of Minnesota, a district with a much less burdened calendar.[8] On December 2, 1970, the Panel assigned the "non-settling" cases to Judge Lord who was specially designated by the Chief Justice of this Court to sit in the Southern District of New York.[9]

---

[6] *West Virginia v. Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871.

[7] *Hartford Hospital v. Chas. Pfizer & Co., Inc.*, 1971 Trade Cas. ¶ 73,561 (S.D.N.Y. 1971).

[8] Prior to making such a motion, plaintiffs' counsel discussed the matter with Judge Wyatt and defendants' counsel. During that discussion, Judge Wyatt informed the parties that he himself had "asked the Panel to consider whether the actions which are not settling should not be assigned to another Judge."

[9] *In re Antibiotic Drugs*, 320 F. Supp. 586 (J.P.M.L. 1970).

Judge Wyatt had, of necessity, devoted much of his time and energies in this consolidated litigation to the "settling cases." Consequently, prior to Judge Lord's assignment, only four orders of general application had been issued in these "non-settling" cases. At the time of his assignment, there were approximately twenty-two categories of matters pending. Although maintaining his regular duties in the District of Minnesota, Judge Lord immediately began moving forward. Between his appointment and the filing of the affidavit which gave rise to this Petition, there were seventeen pretrial hearings of record and many smaller conferences with the court and the parties. These hearings alone have filled an excess of three thousand two hundred pages of transcript and involved more than twenty-eight days. Over eighty-five orders have been issued, in addition to the many rulings from the bench. Petitioners have sought appellate review of four of the lower Court's orders by way of Petitions for Writs of Mandamus. Three of the four petitions have been denied in their entirety.[10] The fourth was denied in substantial part.[11]

Many of the matters before Judge Lord for decision required him to make a thorough evaluation of the prior Federal Trade Commission and criminal case record as well as acquire an intimate familiarity with the pleadings and documents produced by discovery in these cases. For example, plaintiffs sought a ruling that the Federal Trade Commission proceeding and criminal proceeding tolled the

---

[10] *Pfizer Inc. v. Lord*, — F.2d — No. 71-1580, (8th Cir., February 15, 1972) (Pet. App. 3a-30a); *Pfizer, Inc. v. Lord*, 449 F.2d 119 (2nd Cir. 1971) (approving establishment of consumer class actions); *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2nd Cir. 1971) (affirming transfer of cases pursuant to *28 U.S.C.* §1404(a)).

[11] *Pfizer, Inc. v. Lord*, — F.2d — No. 71-1581, (8th Cir., February 15, 1972), discussed *infra* at 6-8.

statute of limitations pursuant to *15. U.S.C.* §16(b) and that they were entitled to utilize the findings of the Federal Trade Commission proceedings as *prima facia* evidence in these cases under *15 U.S.C.* §16(a). After reviewing these prior proceedings and the pleadings in these cases, Judge Lord ruled that the prior Federal Trade Commission and criminal proceedings tolled the statute of limitations in these cases but that the plaintiffs could not rely upon the findings of the Federal Trade Commission as *prima facia* evidence at trial, since the Federal Trade Commission proceedings did not satisfy all of the definitional requirements of *15 U.S.C.* §16(a).[12]

Also, defendants refused to turn over certain documents sought by plaintiffs through discovery procedures, on the grounds that the documents were protected by an attorney-client privilege. Plaintiffs contended that there was *prima facia* evidence that defendants engaged in conduct constituting a crime, tort or fraud and, therefore for purposes of discovery, the documents were not protected by an attorney-client privilege because the attorney's advice was used by defendants in furtherance of their unlawful schemes.[13] In order to resolve this question, at the suggestions of the petitioners, the court appointed three impartial Masters[14]

[12]*In re Antibiotic Antitrust Actions*, 333 F. Supp. 317 (S.D.N.Y. 1971).
[13]See *Clark v. United States*, 289 U.S. 1, 15 (1933).
[14]The three Masters appointed by the Court were:

Leonard E. Lindquist (L.L.B., University of Minnesota), Lindquist & Vennum, Minneapolis, Minnesota; National Director and Chairman of the Regional Advisory Counsel, American Arbitration Association.

Douglas R. Heidenreich (J.D., magna cum laude, William Mitchell College of Law), Dean, William Mitchell College of Law, St. Paul, Minnesota.

Murray L. Galinson (J.D., cum laude, University of Minnesota), visiting Associate Professor, California Western School of Law, San Diego, California.

to assist him in the review of all of the questioned documents and to evaluate them in the light of the evidence presented and made public during prior investigative[15] and judicial proceedings,[16] and the evidence produced pursuant to discovery in the present litigation. The Masters concluded that a *prima facia* showing of fraud on the Patent Office had been made against petitioners Pfizer and Cyanamid and that all documents which dealt with the procurement and enforcement of the patent and the furtherance of the fraud, were not protected by the attorney-client privilege. They further found that the evidence showed a *prima facia* violation of the Sherman Act by petitioners Bristol, Squibb and Upjohn.

Petitioners sought a Writ of Mandamus from the Eighth Circuit Court of Appeals on this issue. As to the lower Court decision regarding petitioners Cyanamid and Pfizer, the Court of Appeals affirmed noting:

> "The Masters found on the basis of the prior F.T.C. proceeding that a *prima facia* case of fraud had been made against these two companies. We agree. The F.T.C. found that Pfizer and Cyanamid had committed a fraud on the patent office in connection with the issuance of a patent. The Sixth Circuit affirmed that finding. *Pfizer and Co. v. F.T.C.*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). Certainly the final decision of the Court of Appeals

[15]See Federal Trade Commission, Economic Report on Antibiotics Manufacture (1958); *Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, on Administered Prices in the Drug Industry*, 86th Cong. 1st and 2d Sess., Vols. 14-26 (1959-60); Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, A Study of Administered prices in the Drug Industry, S. Rep. No. 448, 87th Cong., 1st Sess. (1961).

[16]e.g., cases cited notes 3 & 4, *supra*.

of the Sixth Circuit is adequate to form a basis for the finding of a *prima facia* case of fraud." *Pfizer, Inc. v. Lord*, No. 71-1851 at 11 (8th Cir., February 15, 1972).

The Circuit Court disagreed with the lower court's findings with respect to petitioners Bristol, Squibb and Upjohn and ordered the lower Court to vacate its order as to those defendants without prejudice. *Id.* at 10-11.

2. Proceedings Below

On September 17, 1971, the petitioners filed their affidavits of prejudice and bias pursuant to *28 U.S.C.* §144 (Pet. App. 31a-76a). On September 20, 1971, the Court denied the application for "legal insufficiency."

The Petition for a Writ of Mandamas was filed on October 13, 1971. An answer was submitted by plaintiffs in the sincere belief that the granting of the relief requested in the petition and the consequent appointment of a new judge, unfamiliar with these complex cases, would substantially delay the lower court proceedings and that such delays would seriously prejudice the rights of plaintiffs to receive an efficient and reasonably expeditious adjudication of their claims.[17]

On February 15, 1972, the United States Court of Appeals for the Eighth Circuit issued an opinion denying the requested Writ. (Pet. App. 3a-30a).

3. Findings of the Court of Appeals

In its twenty-six page opinion, the Eighth Circuit ex-

[17]As noted in the Petition, page 5, Judge Lord did not respond: "for of what concern is it to a judge to preside in a particular case?" *Berger v. United States*, 255 U.S. 22, 35 (1921).

amined all of the factual allegations relied on by petitioners and, with respect to each, stated its conclusion. Petitioners description of the findings of the Court of Appeals ignores these conclusions and instead, confines itself to carefully truncated excerpts culled from the opinion.

Petitioners asserted that Judge Lord manifested a biased state of mind while attending the deposition of Harvey W. Edelblute, former patent counsel for petitioner American Cyanamid Company.[18] The Court below, after reviewing over one thousand pages of that deposition transcript and tape recordings of portions of said deposition, stated: "Edelblute did not always respond directly to the questions asked, even when they were asked in a clear-cut manner." (Pet. App. 16a). The court went on to say:

> ". . . we are not impressed with the petitioners' claims that Judge Lord demonstrated personal bias and prejudice through his comments at the deposition, or by his interrogation, of Edelblute . . . *the remarks fail to reflect any personal bias or prejudice.*" (Pet. App. 18a) (emphasis added).

---

[18]Harvey W. Edelblute was responsible for the prosecution of Cyanamid's Aureomycin and tetracycline patent applications and was a participant in events relating to the patent aspects of this litigation. (Pet. App. 38a). With respect to these activities Edelblute filed remarks with the patent office which, among other things, unequivocally stated that there had not been any prior production by his company of the product in question. The Federal Trade Commission found that these remarks were "erroneous". It further found that Edelblute failed to disclose information known to him of inherent prior production even though he knew that this was precisely "the type of information the patent examiner desired." *In the matter of American Cyanamid Company*, Docket No. 7211, Finding as to the Facts and Conclusions of Law, 13, (August 8, 1961), adopted by final order, (September 29, 1967), *aff'd sub nom., Chas. Pfizer & Co., Inc.* v. *Federal Trade Commission*, 401 F.2d 574, 582-83 (6th Cir. 1968), *cert. denied* 394 U.S. 920 (1969).

With regard to the "Hawaii settlement," which petitioners asserted was arbitrarily rejected by Judge Lord, the Court below stated:

> "In a letter to all parties . . . Judge Lord . . . related that it would be 'awkward' for him to approve the settlement on the basis of the meager information then known to him. The letter also stated that the adoption of Judge Wyatt's settlement plan would involve 'an evaluation of plaintiffs' prospects' which the Court is not prepared to make at that time . . . Judge Lord stated in the letter that his rejection of the proposed settlement would be without prejudice to renewing the request at a later time. In the light of the meager information available on this issue, petitioners cannot prevail." (Pet. App. 19a).

With respect to the allegations that Judge Lord had attempted to solicit a class suit comprised of hospital patients, the Eighth Circuit reviewed the alleged comments and facts set forth in petitioners' affidavit and concluded as follows:

> "After consideration of all aspects of the claims of hospital patients, Judge Lord directed that they be dismissed. We have considered this comment and other comments referred to in petitioners' affidavit. In light of the record, we reject the contention that such remarks, individually or collectively, manifest personal bias against petitioners." (Pet. App. 20a).

The Circuit Court then directed its attention toward comments made by Judge Lord at a hearing called to "consider the 'court's role' relating to the 'public interest aspects' of a proposed settlement between petitioners and the United States." The Court below deemed these comments "critical" to an "evaluation of the sufficiency of petitioner's

charges." (Pet. App. 20a). Upon review of each of the complained comments, the Court stated:

> "The record manifests Judge Lord's obvious perturbation over the contemplated settlement. His words were strong. *Yet his ire seems directed not at petitioners but at the government,* which, according to Judge Lord, might be selling out the public interest."[19] * * *

---

[19]The Court of Appeals was correct in concluding that the District Courts interest in the conditions and circumstances surrounding the proposals for settlement of the Federal Government action afforded no grounds for recusal of the trial court judge. The Government is seeking, under Count I of its complaint, the cancellation of the Conover patent upon the grounds that it was procured by fraud. Judge Lord was advised that part of the proposed settlement was the dedication of the balance of the patent term and that the Government then intended to dismiss its cancellation action. At the time that these proposals were brought to Judge Lord's attention, Judge Lord was aware that the 6th Circuit Court of Appeals had found that there was "clear, unequivocal and convincing," evidence that the Conover patent had been procured by fraud. *Chas. Pfizer & Co., Inc.*, v. *Federal Trade Commission*, 401 F.2d 574 (1968). Judge Lord's inquiry only tended to ellicit what the power, duty and obligation of the courts were when an action seeking cancellation of a fraudulently procured patent was about to be dismissed. Judge Lord was aware of the mandate stated by this Court in *Hazel-Atlas Glass* v. *Hartford-Empire Co.*, 322 U.S. 238, 251 (1944):

> "To grant full protection to the public against a patent obtained by fraud, the patent *must* be vacated. It has previously been decided that such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceedings brought by the Government. *United States* v. *Bell Teleph. Co.* 128 U.S. 315, 32 L.Ed. 450, 9 S. Ct. 90, *supra.*" (emphasis supplied).

This Court in that case also stated:

> "This matter does not concern only private parties. *There are issues of great moment to the public in a patent suit. Mercoid Corp. v. Mid-Continent Invest. Co.* decided January 3, 1944 [320 U.S. 661, ante, 376, 64 S. Ct. 268]: *Morton Salt Co. v. G. S. Suppiger Co.* 314 U.S. 488, 86 L. ed. 363, 62 S. Ct. 402. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong

"We note, however, that the Court's remarks concerning the public interest in the settlement of Count I rested upon Judge Lord's assumption, frequently stated in the record, that the government prove the truth of its allegations. Moreover, Judge Lord's concern over the upsetting of his 'game plan' in managing the litigation may have been better left unsaid, but *that statement does not manifest any personal bias and prejudice toward petitioners.*"[20] (Pet. App. 24a-25a) (emphasis added.)

With respect to Judge Lord's comment concerning the role and efficiency of the Patent Office,[21] the Court of Appeals concluded:

---

against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." 322 U.S. at 246 (emphasis supplied).

The above quotations highlight the strong judicial concern for the public and judicial interest in the cancellation of any patent procured by fraud and the protection of the integrity of the judicial system.

[20]Judge Lord's concern over the effect upon his game plan must be considered in light of his mandate from the Judicial Panel on Multidistrict Litigation:

"We are certain that Judge Miles Lord will direct discovery in such a way that pretrial in all 'non-settling cases' will proceed expeditiously and efficiently and without delay or duplication." *In re Antibiitic Drugs*, 320 F. Supp. 586, 590-91 (J.P.M.L. 1970).

[21]It is worth noting that this Court expressed similar concern in *Graham v. John Deere Co.*, 383 U.S. 1, 18-19 (1966), wherein it is stated:

"We have observed a notorious difference between the standards applied by the Patent Office and by the courts. While many reasons can be adduced to explain the discrepancy, one may well be the free rein often exercised by Examiners in their use of the concept of 'invention.' In this connection we note that the Patent Of-

> "Nevertheless, even if we accept petitioners' arguments that these comments disclose a prejudicial attitude concerning the relationship between petitioners and the Patent Office, these observations may have come as a result of Judge Lord's exposure to the prior proceedings. Thus, although Judge Lord's comments were gratuitous and wholly extraneous to the question then before him *we cannot say that they reflect an 'extrajudicial bias' as is required for recusal under Grinnell, supra.*" (Pet. App. 25a) (emphasis added).

Finally, the Court reviewed the comments and actions of Judge Lord and evaluated them "against circumstances disclosed in cases in which appellate courts [including this Court] have forced a judge to recuse himself or reversed a judgment because of demonstrated bias and concluded that "[t]he facts contained in petitioners' affidavit fall short of showing the bias and prejudice needed to recuse." (Pet. App. 28a).

REASONS FOR DENYING THE WRIT

I.

The Eighth Circuit Properly Applied the Law, Including the Decisions of this Court, in Reaching Its Decision.

Section 144 of the *Judicial Code*, Title 28, set out in full in the Petition, page 3 states in pertinent part:

---

fice is confronted with a most difficult task. Almost 100,000 applications for patents are filed each year. Of these, about 50,000 are granted and the backlog now runs well over 200,000. This is itself a compelling reason for the Commissioner to strictly adhere to the 1952 Act as interpreted here. This would, we believe, not only expedite disposition but bring about a closer concurrence between administrative and judicial precedent."

> "Whenever a *party* to any proceeding in a district court makes and files a timely and *sufficient* affidavit that the judge before whom the matter is pending *has a personal bias or prejudice either against him or in favor of any adverse party,* such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> *The affidavit shall state the facts and the reasons for the belief* that bias or prejudice exists, . . ." (emphasis added).

In *Berger v. United States,* 255 U.S. 22 (1921), the question of the judges duty when confronted with an affidavit filed under the predecessor to Section 144 was presented. In that case, this court noted ". . . a distinction between determining the legal sufficiency of the affidavit and passing upon the truth of its statement, . . ." 255 U.S. at 32. The court held that the statute withdraws from the judge, a decision on the truth of the matters alleged in the affidavit. In clarifying its decision the Court set forth certain guidelines for determining the legal sufficiency of an affidavit filed pursuant to the questioned statute. It noted:

> "[O]f course, the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34.

Later the court restated this requirement in the following language:

> "We are of the opinion, therefore, that an affidavit upon information and belief satisfies the section, and that, upon its filing, if it show the objectionable inclination or disposition of the judge, which we

have said is an essential condition, it is his duty to proceed no further in the case." 255 U.S. at 35.

Upon review of the affidavit before it, this Court found that:

> "The facts and reasons it states are not frivolous or fanciful, but substantial and formidable, and they have relation to the attitude of Judge Landis's mind toward defendants." 255 U.S. at 34.

Forty-five years after its decisions in *Berger* this Court again considered the decision of a lower court which denied a motion pursuant to Section 144. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). After reviewing the allegations relied on, the Court stated the standard to be applied in these cases, as follows:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *Berger v. United States*, 255 U.S. 22, 31, 65 L. Ed. 481, 484, 41 S. Ct. 230." 384 U.S. at 583.[22]

In applying this test, this Court concluded:

> "Any adverse attitudes that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for."
>
> * * *
>
> "We have examined all the other claims of the defendants made against Judge Wyzanski and find

---

[22]See also *Ex parte American Steel Barrell*, 230 U.S. 35 (1913).

that the claim of bias and prejudice is not made out." 384 U.S. 583.

The statute as interpreted by this Court requires, as essential elements of a disqualifying affidavit, facts and reason which give fair support to the conclusion that the Court is possessed of a personal or extrajudicial bias or prejudice against the complaining party or in favor of his adversary.

These are precisely the authorities and standards relied on by the Eighth Circuit in this matter. Section IV of its opinion is entitled "The Standard for Recusal." (Pet. App. 12a-14a). Therein the court recited the statute, cited the holding in *Berger, supra,* and the standard applied in *Grinnell, supra.* The Court accepted the truth of the facts recited in petitioners' affidavits and proceeded to determine the validity of petitioners' conclusions by examining the cited facts.

In each instance, the Court concluded that the facts relied on do not manifest a personal bias or prejudice on the part of Judge Lord. Finally, in conclusion the Court evaluated the facts of this case against the circumstances disclosed in other appellate cases, including *Berger,* where personal bias and prejudice was found, and concluded that petitioners' affidavit fails to show the requisite bias and prejudice. (Pet. App. 28a).

II.

Petitioners Argument Has no Foundation in Law or Fact.

Throughout their argument petitioners assume that Judge Lord has created an "appearance of bias." This conclusion has no factual foundation nor is it without more, legally sufficient.

The Eighth Circuit did observe that petitioners, as "advocates" viewing the Court's statements "in a somewhat partisan light," and thus magnifying the impact of any comment of the Court, may have been left with the impression that Judge Lord improperly prejudged the case. (Pet. App. 28a-29a). If this is what petitioners refer to as "appearance of bias" it falls fatally short of the requirements of the statute and the decisions of this Court. Even if "appearance of bias" was the standard to be applied in cases such as this, this subjective appearance test apparently proposed by petitioners is not supported by the cases upon which they rely.

In *Berger, supra,* the Court stated:

> ". . . that [the statute's] solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial;—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment." 255 U.S. at 35-36.

This, however, must be read in conjunction with the statute discussed and the interpretation of that statute found in the *Berger* case. Clearly there is nothing in the statute which suggests the subjective standard advanced in this case by petitioners.

Similarly, neither *Offutt v. United States,* 348 U.S. 11 (1954), nor *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968), support petitioners' theory. Neither of these cases involve the statute in question nor facts similar to those presented in this case. In the *Offutt* case the Court reaffirmed the rule that a judge, when called upon to act in a case of contempt by personal attack upon him, should ask that one of his fellow judges take his place.

In *Commonwealth Coatings Corp. v. Continental Casualty Co., supra,* the Court set aside an arbitration award because, under §10 of the United States Arbitration Act, the failure to disclose the business dealings between the prime contractor and a presumably neutral arbitrator constituted a manifest violation of the strict morality and fairness which Congress expected of them.

Finally, petitioners "appearance of bias" test totally ignores the requirements that the bias be personal and extrajudicial. While acknowledging that this is a "requirement of the statute" (Pet. 12) they contend that this requirement has been too "stringently construed" (Pet. 12) and that lower courts have "strayed" by requiring that the "extrajudicial source" be the exclusive source of the bias. (Pet. 11). Even if this were true, petitioners do not allege that the Court below improperly relied on these cases; rather, they suggest that "This concept may have found its way into the rationale of the Court below." (Pet. 12-13). Petitioners cite numerous lower court cases in which they submit that the courts have misapprehended their task in construing an affidavit filed pursuant to the statute. Petitioners are unable, however, to find one case since *Berger, supra,* in which, in their view, the court properly applied the statute or adopted their suggested "appearance of bias" test.

In short, petitioners are urging that the requirements of the statute and the standards delineated by this Court in *Berger* and *Grinnell* be ignored. They proposed instead that a judge automatically recuse himself when it appears to one party that such judge is biased, regardless of whether or not the facts relied on give fair support to that subjective conclusion. Such a test is equivalent to a pre-emptory challenge not susceptible to judicial review since it turns on

the subjective views of a party. It would allow any party, dissatisfied with the pretrial rulings, orders or statements of a court, to recuse the judge at will. Such an option might well negate substantive pretrial procedures as established in the Federal Rules of Civil Procedure and the Mannual for Complex and Multidistrict litigation.

III.

Neither the Decision of the Court Below Nor the Legal Proposition Advocated by Petitioners Presents an Issue Which Warrants Review by this Court.

As early as 1927, only a few years after the decision in *Berger*, the rule that prejudice must be personal and not based on the judge's experience garnered in the courtroom was stated in the clearest possible terms in *Craven v. United States*, 22 F.2d 605 (1st Cir. 1927), *cert. denied*, 276 U.S. 627.

> " 'Personal' is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias (or state of mind, 255 U.S. 42, 41 S.Ct. 236, 65 L.Ed. 481) against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him. Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective." 22 F.2d at 607, 608.

In the interim between the decisions in *Berger* and *Grinnell*, the Federal Judiciary consistently held that a showing of personal bias and prejudice based upon something other than what the trial judge had learned from his participation in the case was the *sine qua non* of a petition for recusal. Petitioners argue that those holdings were a departure from the standard of *Berger*. This Court had numerous opportunities to review those decisions, but consistently denied certiorari.[23]

In the Petition for a Writ of Certiorari, *Foster v. Medina*, 170 F.2d 632 (2nd Cir. 1948), *cert. denied*, 335 U.S. 909, the following argument appears:

> "We respectfully submit that the departure from the principles of the *Berger* case in Circuits other than the Second Circuit makes this case an appropriate one in which corrective action is indicated by this Court." *Id.* at 13.[24]

By its decision in *Grinnell, supra*, this Court conclusively laid to rest the contention that the lower federal courts had consistently departed from the standard used in *Berger*, by requiring that the bias complained of be personal

---

[23]See *Lyons v. United States*, 325 F.2d 370 (9th Cir. 1963), *cert. denied*, 377 U.S. 969 (1964); *In Re Union Leader Corporation*, 292 F.2d 381 (1st Cir. 1961), *cert. denied*, 368 U.S. 927; *Foster v. Medina*, 170 F.2d 632 (2nd Cir. 1948), *cert. denied*, 335 U.S. 909; *Price v. Johnston*; 125 F.2d 806 (9th Cir. 1942), *cert. denied*, 316 U.S. 677; *Scott v. Beams*, 122 F.2d 777 (9th Cir. 1941), *cert. denied*, 315 U.S. 809; *Ryan v. United States*, 99 F.2d 864 (8th Cir. 1938), *cert. denied*, 306 U.S. 635; *Craven v. United States*, 22 F.2d 605 (1st Cir. 1927), *cert. denied*, 276 U.S. 627; *Chafin v. United States*, 5 F.2d 592 (4th Cir. 1925), *cert. denied*, 269 U.S. 552.

[24]A similar argument was made in the petition for Certiorari filed in *In Re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), cert. denied, 368 U.S. 927. See Petition for a Writ of Certiorari at 12-14, *In Re Union Leader Corp., supra.*

and of extrajudicial origin. Petitioners dismiss the decision in *Grinnell* with the comment that the "case merely reaffirmed the time tested rule that disqualifying bias under the statute may not be based upon a judge's rulings in the case." (Pet. 12).

A reading of the *Grinnell* decision, as well as a review of the briefs and jurisdictional statements filed therein, clearly shows that this contention by petitioners is simply not correct. The Court in *Grinnell* refers not to rulings by Judge Wyzanski, but to "adverse attitudes . . . evinced toward defendants . . . based on his study of the depositions and briefs." 384 U.S. at 583. The briefs of the various appellants-defendants, and of the United States, address themselves, at great length to Judge Wyzanski's opinions and judgments formed on the basis of the pretrial proceedings and evidence in the case before him, and to his statements to the defendants which reflected those opinions. The argument for bias and prejudice against Judge Wyzanski in *Grinnell* was not based upon his prior rulings in the case.

The ruling and facts of the *Grinnell* case closely parallel the decision of the Eighth Circuit in the present case. Additionally, the legal arguments advanced by *Grinnell* are virtually identical with those raised by petitioners in this case. The following excerpts suffice:

> "Indeed, this Court has repeatedly stated that the tribunals of this country should not only *be* impartial but should 'give assurance that they are impartial'. *Berger v. United States*, 255 U.S. 22, 35 (1921), and that 'justice must satisfy the appearance of justice'. *Offutt v. United States*, 348 U.S. 11, 14 (1954). Surely the appearance of justice requires, at a minimum, that the trier of the facts should not form his judgment

ex parte but must instead 'hear the other side' before judging the merits . . ."

* * *

"Less prejudicial statements than those made here were also held to disqualify the trial judge in *Connelly v. United States District Court*, 191 F.2d 692 (9th Cir. 1951), . . . The Ninth Circuit, . . . held the trial judge was disqualified because:

'It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality. . . .' "

"There certainly was not 'such an atmosphere about the proceedings' below that those present at the trial were given 'the assurance,' 'of fairness and impartiality'. . . ."

* * *

"Here there was not merely an atmosphere of hostility, or even of prejudice more concrete. There was not merely a failure to satisfy the appearance of justice, but a perversion of the processes of justice into a ceremonial act." Brief for Grinnell Corporation at 55-61, *United States v. Grinnell Corp., supra.*

Since the *Grinnell* decision, similar rulings have been presented to this Court by way of requests for certiorari, and review has been consistently refused. e.g., *Hodgdon v. United States*, 365 F.2d 679 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029; *Hanger v. United States*, 398 F.2d 91 (8th Cir. 1968), *cert. denied*, 393 U.S. 119.

No conflict exists among the decisions of the various Circuit Courts on the issue raised by petitioners, nor is the

decision of the Court of Appeals for the Eighth Circuit at variance with the applicable decisions of this Court. In light of the lack of factual and legal support for the petition herein, and the prospect of further delay in these important and complex cases by such further interlocutory review, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOHN A. COCHRANE
Suite 830 Minnesota Building
Saint Paul, Minnesota 55101
Chairman, Plaintiffs National Steering Committee

Of Counsel:
COCHRANE & BRESNAHAN, P.A.

RICHARD W. JOHNSON
ROGER A. JOHNSON
1705 First National Bank Building
Minneapolis, Minnesota 55402
Members, Plaintiffs National Steering Committee and Committees of Miscellaneous and Farm Plaintiffs Counsel

Of Counsel:
JOHNSON, THOMPSON, SPRING & KLAVERKAMP

THOMAS J. GREENAN
929 Logan Building
Seattle, Washington 98101
Member, Plaintiffs National Steering Committee and Committee of Government Plaintiffs Counsel

Of Counsel:
FERGUSON & BURDELL

FLOYD E. BOLINE
854 Midland Bank Building
Minneapolis, Minnesota 55401
Member, Plaintiffs National Steering Committee and Committee of Farm Plaintiffs Counsel

Of Counsel:
CHESTNUT, BROOKS & BURKARD